

OFFICE OF THE GENERAL COUNSEL  
Division of Operations-Management

MEMORANDUM OM 04-25

February 12, 2004

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: "Test of Certification" Bargaining Order Summary Judgment Cases

The National Labor Relations Board performance goals under the Government Performance and Results Act of 1993 (GPRA) have included for several years the Board's goal of issuing decisions and orders in "test of certification" refusal-to-bargain cases in a median of 80 days. In the absence of any other avenue to gain review by the courts of the Board's certification of a labor organization as the collective-bargaining representative of its employees, these cases involve the refusals of an employer to recognize and bargain with the union in order to "test" or challenge the certification. Because the employer acknowledges the refusal to recognize and bargain, the only defense customarily offered in answer to a complaint is that the Board's certification was improper or invalid. Accordingly, these cases are usually resolved at the Board level on General Counsel's motion for summary judgment with the issuance of a decision and order finding a violation and ordering bargaining. The employer then secures court review by filing a petition for review with the court of appeals.

The Agency's "test of cert" goal sets a performance target in an area of great importance to the parties. These cases are handled with priority in the Regions,<sup>1</sup> in the Office of the Solicitor, at the Board and with the Appellate Court Branch of the Division of Enforcement Litigation. The Board and General Counsel have recently recommitted themselves to the GPRA goal of issuance of decisions in "test of cert" cases in a median of 80 days. With the Board now at full five-member strength, and given the successes of the Regions' performance in this area in the past, this goal should be attained in fiscal year 2004.

In order to ensure that the Regions continue to do their part to achieve this important Agency GPRA goal, we are asking Regional Directors and other casehandling managers to redouble efforts to identify "test of cert" cases early, discuss their

---

<sup>1</sup> Casehandling Manual Section 10025 provides that, "absent extenuating circumstances," complaints should issue in "test of cert" cases within 14 days from the filing of the charge and motions for summary judgment normally should be filed within 7 days after the respondent files its answer. See OM 01-07 and O2-17, noting that the Field should achieve a median of 40 days from charge filing to motion.

processing with the parties quickly<sup>2</sup> and, if appropriate, issue a prompt complaint. As soon as the expected answer is returned, the Region should be prepared to file its motion for summary judgment with the Board.

If all responsible components of the Agency handle their parts of the processing of these important cases without delay, the Board's GPRA goal of issuing decisions and orders in "test of certification" cases in a median of 80 days will be achieved in fiscal year 2004. Thank you for your cooperation.

/s/  
R. A. S.

cc: NLRBU  
Release to the Public

MEMORANDUM OM 04-25

---

<sup>2</sup> On occasion, processing of "test of cert" cases is slowed by the Charging Party's inclusion of other allegations of unfair labor practice conduct in the charge raising the "refusal to recognize and bargain" claim. To facilitate prompt handling of the "test of cert" issue these allegations could be included in a separate charge and handled separately. Generally, the *Jefferson Chemical 200 NLRB 992 (1972)* line of cases does not preclude moving for summary judgment on a test of certification case and separately proceeding on a companion case involving, for instance, unilateral changes or failure to provide information. (See also Case Handling Manual Section 10026).